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LEGAL EDUCATION. II. WHAT?

*(Continued from February Number, 1873, p. 69.)*

IN taking up the subject of our former article where we left it, we may notice one or two additional particulars, in which the condition of the American Bar has materially changed within the memory of some of its older members. But in doing so, we shall refer more particularly to one of the states with whose history we are the most familiar. The change in the mode of doing business from a dilatory credit system, which required a resort to legal process to enforce payment, to that of cash, or brief credits, with prompt payments, which has superseded the former slovenly way of dealing, has cut off a source of professional occupation upon which young attorneys chiefly relied for support, until a higher class of business could be gained. The same was, in a measure, true of the collection of debts by suits at law, as an important source of lawyers' incomes, when applied to such of the profession as had been many years at the bar. Then, again, the passage of a general Bankrupt Law has, practically, put an end to the bringing of suits merely to enforce the collection of undisputed claims. This course, in connection with the growing tendency towards centralization which has been working changes of late, has drawn the members of the bar to the centres of business to such an extent, that, in a majority of the towns where one or more lawyers were formerly able to earn a respectable competency, they can no longer gain a livelihood. The change, however, has rather been in the mode and sphere of their employment, than in

the need there is of a class answering to attorneys at law. Nor will the business world ever get in advance of such a class of agents, until men of affairs should be able to do their own work, and dispense with clerks, overseers, hired servants and agents generally.

We recur then to what is to be demanded of the profession, in the way of education and learning, to keep pace with the spirit and requirements of the age. There will always be a considerable number at every bar, whose occupation is a mechanical dealing with its details. Accuracy and readiness of despatch, with such men, are what is wanted, rather than breadth of learning or a familiarity with principles. But, for those who hope to lead at the bar, and make their influence felt in directing and sustaining sound public thought, the field of study and labor is becoming every day broader and more difficult to master. With all the necessity there is and must be for rules of law which are recognised merely because they are rules, there are in the constitution and laws of every state fundamental principles which, with their relations, must be studied and understood, if one would undertake to improve upon the narrow and technical forms in which their spirit may have been bound up and fettered. Especially is this true whenever it is attempted to apply fixed and established forms of law to new and unaccustomed combinations and relations of business or social life. There would be little advantage in the free intercourse of nations which we owe to an advanced civilization, if every state rigidly insisted upon its own laws, while it ignored the wisdom or application of those of all others. Instead of that, there has been, for a century or two, a gradual and all but imperceptible process of assimilation going on between nations, whereby, in their intercourse with each other, they are more like provinces of one broader state in their laws and administration, when applied to the citizens of other states, than separate and independent bodies politic, as they once were. The principles of private international law are scarcely less respected or observed by the courts of civilized nations, than the positive enactments of their own municipal law. This renders it necessary for every lawyer who deals with questions involving principles which lie outside of mere local law, to study jurisprudence in its broader relations to men and human affairs. And this, again, is but saying that to be worthy of the name of a lawyer, one must study and understand somewhat at least of that most interesting science,

comparative jurisprudence—how law is affected by the circumstances of a people, physical as well as social and political: why the law of one nation may not be suited to the wants and condition of another; and how it changes, of its own accord, with the habits of thought and the wants and needs of a people, independent of the form of government under which they live.

Another improvement is called for in the study of the law, which is sustained, if not suggested, by what has already been said, and that is, to take it up and pursue it from an historical point of view, instead of accepting it as a mere dogma, to be treasured up in the memory and applied, as a carpenter does his rule, in judging whether it is fitted to the place where it is needed. And, as our space does not admit of multiplying illustrations of what we mean by such a mode of study, we propose to confine our remarks to a single department of the common law—that of Real Property. We select this because it is generally regarded as embracing a body of rules derived from the common law, more than ordinarily technical and arbitrary, more like those of an exact science, and more to be recalled by a pure effort of memory than the less definite notions of commercial law. Let a student undertake to study this law of Real Property, and he soon finds that he must go back to a system which has been obsolete and effete for a couple of centuries or more, for the very meaning of the terms which are in use upon every page of the volume he is reading. He is told that if he would create an estate of inheritance by deed, he must limit it not only to his grantee but to his “heirs,” and that no synonym will supply its place; and though he may be ready to adopt this as a rule, to be remembered when no reason for it is given, he is greatly relieved and aided in understanding it, when, if he will pursue it to its source, he finds that it had its origin in a state of things once actually existing which led to its introduction, and explains its meaning and effect. So, as he proceeds and learns to apply the test of feudal ideas to the parts of the system which come successively under his examination, he finds it easy also to understand the doctrine of “*tenures*” and “*estates*.” But when he gets beyond those, into the mystery of Uses and the conditional limitations of original independent freehold estates *in futuro*, he finds no aid in threading his way from the light of feudalism which has thus far helped him on his course, and is obliged to look to some other quarter

for guidance. And then, if not before, he is interested to know that, away back in the history of civilization, ante-dating both feudalism and the common law, there had been gathered in the process of ages, an exhaustless supply of the purer elements of law, which had infused themselves into the sound life vitalizing the institutions of republican Rome, and lending to the modern systems of Europe and to even the common law of England itself, no little of what gives them their present value and efficiency. If, acting upon this discovery, he pursues his inquiry into its bearing upon such parts of our law of real property as his study of the doctrine of feuds has failed to illustrate, he not only unlocks the source and origin of Uses and Trusts, and the thousand forms in which they enter into the creation, management and disposition of estates, but lays hold of a clue which may serve to explain a great variety of matters in the system of real property which, without it, would remain a mystery beyond his capacity of solution. He finds, for example, that the judicial farce in which the English courts took a part for hundreds of years, of barring estates tail by common recoveries, had its prototype in the *Cessio in Jure* of the Roman law, overriding by its application, through a cunning device of the courts, the positive rule of a statute which had been solemnly enacted and never repealed.

Without anticipating any further the extent to which the civil law enters into the composition of the English and our own common law, we have reached the point at which we have been aiming, that it should, to some extent at least, form a part of the course of study in every institution in which law is professed to be taught. The time has long since passed when, as we are told, upon authority, "English judges and lawyers avoided having anything to do with the Roman law, and were not ashamed to boast of their ignorance of it, and to show their aversion and contempt of it." The tendency now is in the other direction, and to affect a knowledge of it without having studied it. The better it is understood, the more fully we now appreciate how much of the common law has been borrowed from it. Professor Güterbock, whose work has been ably translated by Mr. Brinton Cox, has succeeded in showing how freely Bracton drew from the Roman law and the glosses of Azo and other writers upon that law, in the composition of his celebrated work, "*De legibus et con-*

*suædudinibus Angliæ*," which has been accepted as a kind of treasure house of the common law. Nor can one become familiar with the doctrine of Prescription, or Bailments, or Servitudes and Easements, or Equity, in its modern sense, without going back to the civil law in some form for the principles upon which the law as to those is based. And the same may be said of our whole system of probate, and much of our bankrupt law. The student may, indeed, find all that is necessary for practical purposes in respect to these in treatises upon the common law. But when studied in that way, the rules which he finds laid down are little other than arbitrary dogmas, wanting the life and spirit of elementary learning, by means of which the origin and reason of such rules are unfolded as a part of the learning of the rule itself. If for the elements of the common law anybody must go to the teachings of the civil law, when and by whom can this be more properly or usefully done than by the student when he is laying a foundation for that knowledge which is to serve him when new questions arise, as well as in helping him to understand what has already been settled and decided? What condition, for example, would a student be in for commencing the practice of the law, who had never read anything but what he had found in some legal compendium, without ever having looked into the decision of a court, or understood the grounds, or the course of reasoning, on which judges reach their conclusions as to what they have occasion to enunciate as law?

Until recently there have been good reasons why a study of the civil law was well nigh a thing impossible to most students of the common law. The books to which they could have access, were so few, and the study of most of these was so dry and repulsive, that only here and there was there any one who had the hardihood to undertake it. The original of the *Corpus Juris* was in Latin, which, as well as the numerous and formidable glosses to which it had given rise, were, to most English students, little better than sealed books. The early English treatises upon the civil law were not written by lawyers, but theologians, and not from a lawyer's stand-point. That was the case with Dr. Wood's "New Institute," published in 1721, and Dr. Taylor's "Elements of the Civil Law," published in quarto, in 1755. The latter, moreover, is so overlaid with learned quotations from Greek and Latin writers, that one needs a polyglot dictionary to

master a single page of it. Professor Brown's lectures on the civil law, delivered in the Dublin University about the commencement of the present century, is a much more readable book, and may be studied with satisfaction and to advantage. In his preface, he has occasion to speak of two other works upon the civil law which had been regarded as a kind of standard authorities for reference—Domat and Ayliffe. "Domat," says he, "is calculated for the meridian of France. Ayliffe's work, though learned, is dull, tedious, and stuffed with superfluous matter."

Since that time, the difficulty as to books has been gradually relieved, till the student has at his command works in his own language, by which he can make himself master of enough of the history and elementary principles of the civil law to be of immense value to him in illustrating and explaining parts of the common law. Without undertaking to give an entire list of them, we might mention Judge Cooper's translation with notes of the Institutes, in 1812, and Dr. Irving's "Introduction to the Study of the Civil Law," a fourth edition, in 1837. An admirable translation of the Institutes, with an introduction and copious notes by Thomas C. Sanders, appeared from the English press in 1853. The following year Mr. Cushing published a brief course of lectures on the study of the Roman law, which he had delivered before the Harvard Law School. And still later than these, we have a most valuable and interesting work by Lord Mackenzie on "Studies in Roman Law." And this was followed by "Institutes of Roman Law" by Frederick Tomkins, an English barrister, which every student may read with pleasure and profit. The renowned commentaries of Gaius, which had been supposed to be lost until their accidental discovery at Verona in 1816, and which serve as a key to much that was before but partially understood in the *Corpus Juris*, was translated into English and published with a valuable introduction and notes in 1870. And to these we might add the works of Mr. Maine, which, though not specific treatises upon the civil law, go back, in fact, to still more archaic and elementary principles of jurisprudence than the Roman law itself, although adopting that as a typical system for purposes of illustration. His "Ancient Law" deserves the careful study of every liberal scholar, whether in law or general literature, and should find a place in the *curriculum* of every student at law.